

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: June 29, 2009

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Peterbilt Motors Co.
Case 26-CA-23225

This Section 8(a)(5), (3), and (1) case was submitted for advice regarding whether the Union requested relevant information when it asked the Employer to supply labor cost information concerning nonunit employees after the Employer raised comparative labor costs during contract bargaining; whether the Employer effectively retracted its labor cost claims; and whether, if the Employer's refusal to supply the information was unlawful, that refusal converted a lawful lockout of employees into an unlawful one.¹

We conclude that the Employer's refusal to supply the requested information to the Union was unlawful because the information was relevant to collective bargaining and the Employer did not effectively retract its statements that made the nonunit costs relevant to bargaining, and that the Employer's refusal to supply the requested information converted the lockout to an unlawful one.

FACTS

Background

Peterbilt Motors Co. (the Employer), is a truck manufacturing division of PACCAR, Inc., and has manufacturing plants in Madison, Tennessee; Denton, Texas; and Ste-Thérèse, Quebec.² The Employer and UAW Local 1832 (the Union) have had a collective bargaining relationship

¹ The Region found no merit to unfair labor practice charge allegations that the Employer engaged in surface bargaining and failed to fulfill information requests concerning unit employees.

² A second PACCAR, Inc. truck manufacturing division, Kenworth Trucking Co., has plants in Ohio, Washington State, and Quebec.

regarding the Employer's Madison, Tennessee plant production and maintenance employees since about 1973.³ Their most recent agreement was effective from June 23, 2003 through June 20, 2008.⁴ This case arises out of a Union information request made during bargaining for a successor collective bargaining agreement concerning the Madison plant employees.

Throughout bargaining, the Union opposed the Employer's proposals for outsourcing and for a multitiered compensation system with three tiers for wages and two tiers for insurance. The Union opposed the proposed outsourcing because of its potential to cost unit employees' jobs and the multitiered compensation because it would have affected adversely about one half of the bargaining unit, the 300 senior employees who were laid off in early 2007 and who were subject to recall.

Employer Compares Madison Labor Costs with other PACCAR Plants

Between April 30, when the parties began bargaining, and June 11, the parties discussed non-economic issues. During those sessions, as to outsourcing, the Employer proposed new language giving it the exclusive right to outsource any plant activities. The Employer also proposed deleting existing provisions requiring the Employer to discuss outsourcing with the Union and to recognize the Union at any plant within 50 miles of the Madison plant.

On June 11, the Employer presented its economic proposals. As to multitiered compensation, it proposed separate wage rates for three tiers of employees: active employees, employees recalled from layoff, and newly hired employees. For insurance benefits, the Employer proposed two tiers: active employees, and recalled and new employees.

The Union objected to a multitiered compensation system, arguing that it would foster divisiveness and adversely affect the laid off employees. The Employer responded that it was offering a fair wage package for the

³ The Union does not represent employees at the other PACCAR plants.

⁴ In 1998 and 2002, the Employer locked out Madison plant employees during bargaining for predecessor collective-bargaining agreements. In both years, the parties reached agreement after the Union filed unfair labor practice charges.

Madison geographic area and that employees should be happy to earn those wages. The Employer suggested that the Union tell its members to search for another Madison area workplace that paid what the Employer was proposing.

During bargaining sessions, the parties often broke into smaller, on-the-record sidebar meetings. At a June 13 sidebar meeting, during a discussion with two Union representatives about the Employer's outsourcing proposals, the Madison facility Plant Manager said that the Employer had to get its labor costs down, that the Madison plant was the highest in labor costs of all PACCAR facilities. An International Union Representative asked if by making this comparison, the Employer was relying on the labor cost per unit. A second Employer representative, the PACCAR Director of Labor Relations (Labor Relations Director), said that the Employer did not mean labor cost per unit, but that Madison was the highest cost per hour per employee and that was excluding Mexico sites.

At the June 16 sidebar meeting, the Labor Relations Director, in discussing economic proposals, repeated to the two Union representatives the statement that Madison was the highest cost facility.

**Union's Information Requests for PACCAR Plant
Labor Costs**

At a June 19 sidebar meeting, an International Union Representative rejected the Employer's outsourcing and insurance benefit proposals. He stressed the importance to the Union of the plight of the 300 laid off employees. He also said that because the Employer had raised the issue about the comparatively lower labor costs at other PACCAR plants, the Union wanted to see the labor costs for the other plants. To that end, he handed the Labor Relations Director the following written information request:

In the spirit of good faith bargaining and in the interest of reaching a timely settlement, the Union is requesting the following information based on the Employer's assertion during this round of collective bargaining that the UAW represented PACCAR/Peterbilt facility in Madison, TN was the highest cost facility operationally. For every PACCAR production facility in the United States, please provide the following information for production and skilled trades employees. Please provide the information separately for each facility.⁵

The International Union Representative said that he knew the Union could compete if it got the numbers and explained that the Union had submitted a similar form of request at other companies.

The Labor Relations Director said that she was concerned that the Union was taking information gained in a sidebar and using it to gain inappropriate leverage over the Employer. She said that holding sidebar meetings might not be a good thing.

The International Union Representative replied that two Union representatives had been present when the Employer made the labor cost claims and that he knew the Union could compete if it had the necessary information to formulate proposals. He also said that he understood the Employer might not be able to obtain all of the requested information for the Union immediately, but that the Employer should provide the readily available information at once. He observed that some companies simply opened their books upon receiving a request. The Labor Relations Director said that companies who did so were probably in dire straits. She said she would get back to them on the request.

At a June 20 session, the day the contract expired, the Union presented new insurance and wage proposals, which included uniform insurance benefits and wage increases for all employees. The Employer presented its final offer. The Union objected to the Employer's modified outsourcing

⁵ The Union's letter requested such information as hourly wage rates by classification; number of employees in each classification; number of hours worked and paid in 2007 and 2008; amount of overtime hours worked; number of holidays and vacation days used annually; insurance and other benefits provided; and number of temporary employees and their hourly wage rates.

proposal, which still gave the Employer greater outsourcing authority, including the right to outsource components, and objected to the Employer multitiered compensation proposal. A Union International Representative told the Employer that they should keep bargaining; that they had many open issues remaining; and that they were not at impasse. The Labor Relations Director said that what the Union viewed as open issues, the Employer viewed as disagreements; that the Employer would not extend the contract if the parties did not reach a new agreement; and that the Employer would not let employees work without a contract.

On June 22, the Union held an employee meeting. The Union distributed a bargaining committee letter to the employees explaining the differences between the parties' proposals; characterizing the Employer's proposals as "immoral and unacceptable;" and reminding the employees that those laid off employees awaiting recall were the same employees who had stood with the Union during the 1998 and 2002 lockouts. An International Union Representative told employees that the bargaining committee believed that there were too many open issues to reach agreement, including outsourcing and the multitiered compensation proposal, which had too adverse an effect on laid off employees. He said the Employer had not provided the labor cost information the Union requested about the other PACCAR facilities and that the Union could not make an intelligent decision without that information. The Union did not hold a vote among the members on the Employer's offer. The employees voiced their objections both to the wage reductions for laid off employees and to the outsourcing provisions.

Employer Locks Out Employees and Refuses To Provide Information

On June 23, the Employer, after learning that the Union did not hold a vote on the Employer's proposals, told unit employees not to report to work and locked them out. Also on June 23, the parties spoke via teleconference and identified outstanding issues. By letter faxed June 24, the Union's International Vice President asked the Employer to resume bargaining and to provide the requested information. He stated that the parties had only just begun to discuss some of the Employer's significant proposals, including its multitiered compensation proposal. He also stated that for the process to move forward, "[we] need you to provide the information that we requested," and that "[t]his data will help us evaluate the Company's proposals, and to develop our own"

By letter dated June 26, the Plant Manager agreed to meet, but said that the Employer had provided in a timely manner all relevant information requested. Among other things, he asked the Union to identify any information that it still sought.

By letter faxed June 30, the Union's Vice President discussed the information that the Employer had not provided. As to the labor cost information, he stated:

On June 19th, we reiterated our request for information about the labor costs at non-union truck facilities (to which you've compared the Madison plant.) We ask that you provide this information without further delay.

By letter dated July 3, the Plant Manager denied that the Employer had compared Madison wages and benefits with those at other PACCAR facilities and further stated that the Employer did not view the Union's June 19 document as an information request. By letter dated July 8, the Union responded that the Employer had more than once claimed that Madison labor costs were higher than those at other plants and asserted that the Employer's claim that the Union had not requested the labor cost information was "just plain wrong." Specifically, the letter stated:

You assert that the data requested is irrelevant because the Company has allegedly not "compare[d] the wages and benefits at Nashville with those of other PACCAR facilities." This is untrue. More than once, Peterbilt has claimed that the per hour labor costs at the Madison facility are higher than those at other plants. Before we can make an informed decision about the concessions that you've proposed, we need to know if the costs at Madison are in fact comparatively high. For this reason, we made the data request on June 19th.

The Union's July 8 letter also expressed surprise that the Employer did not view the Union's June 19 document as a demand for information and reminded the Employer that during the sidebar discussion, the Union had plainly stated that it needed the information about other plants' labor costs to evaluate the Employer's proposals. On July 8, the parties met with a federal mediator. Among the issues discussed was outsourcing.

At a July 16 session, the Plant Manager gave the Union a letter stating that the Employer "did not compare the [Madison] wages and benefits" with those of other PACCAR

facilities, and that the Employer would resolve any misunderstanding about the basis for its wage and benefit proposal during bargaining. At the session, the Labor Relations Director also commented that the Employer did not use information regarding the other PACCAR facilities as a basis for its position.

An International Union Representative responded that the Employer had made the labor cost statement more than once and that the discussion had not been confidential. He further stated that when the Employer had said Madison was the highest in the corporation in labor costs, he had sought clarification of the statement, and the Employer had clarified that it was relying on per hour costs. The Labor Relations Director responded that they would meet the next day.

At an August 19 session, an International Union Representative stated that the two major issues separating the parties were the Employer's insistence on broad outsourcing language and its multitiered compensation proposal, with its impact on recalled employees. He underscored that it was insulting for the Employer to propose providing the same benefits to recalled employees as to new hires and that the Union could not agree to such reduced compensation for recalled employees who had such lengthy seniority.

On August 20, the parties met for the last session. The Labor Relations Director said that if the Union did not accept its last proposal, which included modifications in insurance premiums for recalled employees and increased wages for recalled employees offset by reduced retiree insurance benefits, the parties would be at impasse. The Union said it could not agree to reduce retiree benefits to provide increased wages to recalled employees and that it was withdrawing its last comprehensive proposal. By letter dated August 20, the Union informed the Employer that it had withdrawn its comprehensive proposal in the face of the Employer's refusal to compromise.

The Employer never provided the requested nonunit labor cost information.

In February 2009, the Employer issued a WARN Act notice that it would close the Madison facility for an indefinite period, for a least 6 months, and that it would lay off all active unit employees. The Employer relocated work to Denton, Texas.

ACTION

We conclude that the Employer's refusal to supply the requested information to the Union was unlawful because the information was relevant to collective bargaining; the Employer did not effectively retract its statements that made the nonunit costs relevant to bargaining; and the Employer's refusal to supply the requested information converted the lockout to an unlawful one.

**The Labor Cost Information Was Relevant to
Collective Bargaining**

Section 8(a)(5) prohibits an employer from refusing to bargain collectively with the representative of its employees. An employer's statutory duty to bargain encompasses the duty "to furnish a union, upon request, information relevant and necessary to enable [the union] to intelligently carry out its statutory obligations as the employees' exclusive bargaining representative."⁶ The duty to provide information includes information relevant to contract negotiations.⁷

Information about bargaining unit employees' terms and conditions of employment is presumptively relevant to a union's representational duties.⁸ Where the information sought concerns matters outside the bargaining unit, the union bears the burden of showing the potential relevance of the requested information.⁹ However, "that burden is not exceptionally heavy."¹⁰ "The standard for relevancy in

⁶ Florida Steel Corp., 235 NLRB 941, 942 (1978), enf'd in relevant part, 601 F.2d 125, 129 (4th Cir. 1979). See NLRB v. Acme Industrial Co., 385 U.S. 432, 435 (1967).

⁷ Day Automotive Group, 348 NLRB 1257, 1257, 1262 (2006); Dodger Theatricals Holdings, Inc., 347 NLRB 953, 967 (2006).

⁸ See Beverly Health & Rehabilitation Services, 346 NLRB 1319, 1326 (2006); Georgetown Holiday Inn, 235 NLRB 485, 486 (1978); Curtiss-Wright Corp., 145 NLRB 152 (1963), enf'd, 347 F.2d 61 (3d Cir. 1965).

⁹ National Grid USA Service Co., 348 NLRB 1235, 1235 n.1, 1242-1243 (2006); Dodger Theatricals Holdings, Inc., 347 NLRB at 953, 967; Caldwell Mfg. Co., 346 NLRB 1159 (2006); Shoppers Food Warehouse Corp., 315 NLRB 258, 258-259 (1994).

¹⁰ See Duquesne Light Co., 306 NLRB 1042, 1042-1044 (1992) (union entitled to nonunit classification information when

either situation is the same: a liberal 'discovery-type standard.'"¹¹ The information "need not be dispositive of the issue between the parties but must merely have some bearing on it."¹² The requestor need show only a "potential or probable relevance . . . to give rise to an employer's obligation to provide information."¹³

An employer's statements and bargaining proposals can make nonunit information relevant to negotiations.¹⁴ If an employer presents a claim to a union, then refuses to provide requested information to substantiate the claim, collective bargaining is frustrated and rendered ineffective.¹⁵ Thus, once the employer makes the non-bargaining unit information relevant, it has created its own duty to fulfill the union's request.¹⁶

nonunit employees performed unit work); Gulf States, 287 NLRB 43 (1987) (union entitled to information regarding supervisors' compensation when related to unit employees' work); United Graphics, Inc., 281 NLRB 463 (1986) (union entitled to information regarding temporary employees when they performed same tasks as unit employees).

¹¹ Pennsylvania Power & Light Co., 301 NLRB 1104, 1104-1105 (1991) (citing Acme Industrial, 385 U.S. at 437 & n.6).

¹² Pennsylvania Power & Light Co., 301 U.S. at 1105. See Bentley-Jost Electrical Corp., 283 NLRB 564, 568 (1987).

¹³ Shoppers Food Warehouse, 315 NLRB at 259. See Acme Industrial, 385 U.S. at 437 n.6; Kathleen's Bakeshop, LLC, 337 NLRB 1081, 1093 (2002), enf'd, 2003 WL 22221353 (2d Cir. 2003). See Metropolitan Home Health Care, 353 NLRB No. 3, slip op. at 1 n.2, 6 (2008).

¹⁴ Caldwell Mfg. Co., 346 NLRB at 1159.

¹⁵ Leland Stanford Junior Univ., 262 NLRB 136, 145 (1982), enf'd, 715 F.2d 473 (9th Cir. 1983).

¹⁶ Caldwell Mfg. Co., 346 NLRB at 1159. Although some of the cited cases address claimed financial inability to pay, the same principles for testing bargaining relevancy are applicable for determining the relevancy of nonunit compensation information. See Graphic Communications Workers Local 508 v. NLRB, 977 F.2d 1168, 1171 (7th Cir. 1992) ("[i]f an employer makes claims of poverty, or any other substantiatable factual claim, it must substantiate the claims if the union so demands"), enf'g Nielsen Lithographing Co., 305 NLRB 697 (1991) (finding no duty to

In Caldwell, for example, the union requested information that responded to specific employer claims made during bargaining. The employer maintained that the union must accept the employer's proposals because of the employer's goal to become more competitive within the industry. The employer claimed that its other plants were more competitive than the union-represented facility. The Board held that the union was entitled to the information requested about those plants to test the accuracy of the employer's claims and to enable it to respond with counterproposals. Thus, the employer made the information relevant and created its own duty to fulfill the Union's request.¹⁷

Here, the Employer stated that Madison was the highest cost facility and that it needed to bring Madison in line with its other facilities. These claims, and the context in which they were made, show that they were the basis for the Employer's concessionary outsourcing and multitiered compensation proposals and made the nonunit labor cost information relevant to the contract negotiations. Thus, on June 13, while explaining its outsourcing proposal, the Madison Plant Manager said that the Employer had to get its labor costs down, that the Madison plant was the highest in labor costs of all PACCAR facilities. When the Union asked whether that meant labor cost per unit, the PACCAR Labor Relations Director responded that it did not, that it meant the highest cost per hour and that was not including Mexico. And at a June 16 sidebar discussing its economic proposals, the Labor Relations Director repeated the

provide information). See also Caldwell, 346 NLRB at 1160 & n.6.

¹⁷ Caldwell, 346 NLRB at 1160 & n.6. See E.I. Du Pont de Nemours, 264 NLRB 48, 51-52 (1982), *enf'd*, 744 F.2d 536 (6th Cir. 1984) (union entitled to wage rates of nonunit employees working at comparable employer facilities; without information the union could not intelligently formulate its proposal for a different wage policy other than the one used by the employer, which was based on local pay comparisons); Leland Stanford Junior Univ., 262 NLRB at 145 (union entitled to nonunit job description to enable the union to bargain over a related unit classification; collective bargaining flouted when employer raised, but refused to substantiate, a claim), *enf'd*, 715 F.2d 473 (9th Cir. 1983); Lamar Outdoor Advertising, 257 NLRB 90, 93-94 (1981) (union entitled to compensation data for other plants to aid in bargaining in part because the employer's proposals reflected its consideration of its other plants' wages and benefits).

statement that Madison was the highest cost facility. Given that two separate Employer representatives made these statements on two occasions in the context of justifying its economic proposals, we conclude that these claims were the basis for the Employer's proposal.

Moreover, the information at issue was central to the Union's ability to effectively represent the unit in bargaining because it pertained to the Employer's insistence on two major issues preventing the parties from reaching agreement—broad outsourcing clauses and reduced compensation for recalled employees through a multitiered compensation system. The Union needed the Employer's data regarding other facilities' labor costs, both in order to intelligently formulate a proposal for a different wage policy, and also to test the accuracy of the employer's claims and determine whether it could justify the Employer's contentious proposals to the bargaining unit.¹⁸

By thus linking its concessionary outsourcing and multitiered compensation proposals to cost comparisons of nonunit facilities, the Employer made that information relevant to the Union's ability to perform its representational duties.

The Employer Did Not Effectively Retract its Labor Costs Claims

An employer cannot make a clear claim regarding the basis for its bargaining position and then say "'disingenuously or in bad faith'" that it never made such a claim.¹⁹ "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims."²⁰ The "inquiry must always be whether or not ... the statutory obligation to bargain in good faith has been met."²¹ Thus, to be effective, an employer's subsequent

¹⁸ See Taylor Hospital, 317 NLRB 991, 994 (1995), review denied, 82 F.3d 406 (3d Cir. 1996) ("If the Union were to accept [the Employer's] claims without requesting to see available verifying documentation, it would not be properly representing its members").

¹⁹ See Richmond Times-Dispatch, 345 NLRB 195, 198 (2005) (quoting Lakeland Bus Lines v. NLRB, 347 F.3d 955, 964 (D.C. Cir. 2003), denying enf. to Lakeland Bus Lines, 335 NLRB 322 (2001)).

²⁰ NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956).

²¹ Id. at 153-54.

disavowal of its initial claim must accurately reflect the employer's true bargaining position.²² In deciding whether the purported retraction, rather than the initial claim, reflects the employer's true position, the Board analyzes the assertions themselves and the circumstances surrounding them. For example, the initial claim is more likely to reflect the employer's true bargaining position if it is unequivocal and carefully considered, rather than an offhand statement made in the heat of bargaining.²³ An employer's attempt to retract the initial claim is more likely to reflect the employer's true bargaining position if it is prompt,²⁴ unequivocal,²⁵ and based on a credible

²² See Stroehmann Bakeries, Inc., 318 NLRB 1069, 1079 (1995) ("employer violates its bargaining obligation by failing or refusing to provide [] information, notwithstanding an express disclaimer that it is pleading inability to pay, where the thrust of the employer's position indicates otherwise"), enf. denied in relevant part, 95 F.3d 218, 223 (2d Cir. 1996) (union not entitled to information because the employer made clear that it had sufficient financial resources, that it was seeking greater efficiency, and that it was not claiming an inability to pay); Shell Co., 313 NLRB 133, 134 n.7 (1993) (facts and circumstances warrant finding that employer pleaded a present inability to pay; fact that employer expressly disclaimed during negotiations that it was pleading inability to pay was not dispositive); Clemson Brothers, 290 NLRB 944, 944 (1988) ("[w]hen the entire course of conduct is examined, the [employer's] disclaimer of having made a financial inability to pay claim rings hollow").

²³ See American Polystyrene Corp., 341 NLRB 508, 509 (2004) (employer's claim of going broke, made during the "heat of bargaining," did not constitute a "claimed inability to pay" and did not create duty to disclose corroborative financial documents when the very next day the employer explained that although times were tough, the employer had never said that it could not afford the union's proposals, and that in "uncertain economic times," the employer needed to be "cautious"), enf. den. sub nom. UFCW Local 1C v. NLRB, 467 F.3d 742 (9th Cir. 2006) (in denying enforcement, the Ninth Circuit found that, in context, the employer's conduct at its "essential core" showed that despite the purported retraction, the employer "continued to claim it could not pay for the Union's proposals").

²⁴ See, e.g., Richmond Times-Dispatch, 345 NLRB at 198 (employer's disavowal letter was effective when it made clear the true meaning of its claim in relation to its proposal and sent the clarifying letter before bargaining began over the relevant subject); American Polystyrene

rationale.²⁶

Here, the Union requested the information regarding labor costs at the Employer's other facilities on June 19.²⁷ On July 16, the Employer refused to provide the information and instead stated that it did not use the information as a basis for its bargaining position. Accordingly, if the Employer's July 16 statement did not amount to an effective retraction, then its refusal to provide the requested information was unlawful.

Applying the above principles, we conclude that the Employer's initial claim - linking its concessionary economic proposals and the fact that Madison was the highest cost facility and an expressed need to bring Madison in line with its other facilities - reflected its true bargaining position and that its purported disavowal thus did not negate its duty to furnish the information.

Corp., 341 NLRB at 509 (employer clarified its position the next day).

²⁵ See, e.g., Advertisers Mfg. Co., 275 NLRB 100, 100-101 (1985) (employer unequivocally disavowed inability to pay with specific written reasons for nonpayment of bonus); Lakeland Bus Lines, 335 NLRB at 324-326 (information was relevant despite a purported retraction because the retraction was not clear, the union did not acknowledge any retraction, and the employer had merely changed a bargaining position).

²⁶ Central Management Co., 314 NLRB 763, 768-769 (1994) (after the employer disavowed an earlier inability-to-pay statement, the union admitted it was "obvious" employer no longer claimed an inability to pay). Compare General Electric Co., 192 NLRB 68, 68 n.1 (1971), enf'd, 466 F.2d 1177 (6th Cir. 1972) (employer's disclaimer of reliance on the wage surveys of comparable employers did not negate duty to furnish the union with the information as it was not credible that the employer did not rely on its surveys in analyzing its own employees' wages); Advertisers Mfg. Co., 275 NLRB at 100-101 (employer supplied specific written reasons).

²⁷ We agree with the Region that July 16 is the operative date for the Employer's refusal to provide the information because the Employer informed the Union on July 3 that it did not consider the Union's initial June 19 document as a request for information, and the Union clarified that it was making an information request on July 8.

First, the Employer's initial claim was unequivocal, and clearly reflected a carefully considered bargaining position rather than an offhand, spur-of-the-moment assertion. At a June 13 sidebar session, two days after the Employer presented its concessionary wage package, the Plant Manager explained that the Employer had to get its labor costs down, and that the Madison plant had the highest labor costs at all the Employer's facilities. The Labor Relations Director also explained that those calculations were based on highest costs per hour, excluding Mexico. At a June 16 sidebar session, the Labor Relations Director repeated that Madison was the highest cost facility. The fact that two Employer negotiators, at separate sessions, specifically pointed to the labor costs at their nonunit facilities to justify their concessionary proposals, and even explained the type of calculations they used to reach those cost comparisons, demonstrates that their claims were carefully considered positions and not offhand assertions made during the "heat of bargaining."²⁸

Second, the Employer did not promptly, unequivocally, or credibly disavow its initial claim. As to promptness, on June 19, almost a week after the Employer made the claim, the Labor Relations Director, in response to the International Union Representative's request to see the comparative costs, did not deny their relevance but instead complained that the Union was using that information to gain leverage in negotiations. It was not until July 3 - three weeks after the Employer announced that it was basing its concessionary proposals on cost comparisons between Madison and its nonunit plants - that the Employer wrote a letter attempting to retract that claim. In the meantime, the parties held numerous negotiating sessions during which the Union's failure to obtain the information stymied its ability to formulate an intelligent proposal.²⁹

Further, neither the Employer's initial July 3 letter nor its subsequent July 16 letter, in which it formally refused to provide the information, unequivocally or credibly disavowed its initial claim that it was basing its concessionary proposal on a comparison with its other facilities. To the contrary, the letters never denied that the Employer had told the Union that it had to get its

²⁸ Compare American Polystyrene Corp., 341 NLRB at 509.

²⁹ Compare Richmond Times-Dispatch, 345 NLRB at 198 (employer sent the clarifying disavowal letter before bargaining began over the relevant subject); American Polystyrene Corp., 341 NLRB at 509 (employer clarified its position the next day).

costs down; that the Employer had explained the method it used for determining the comparative costs; or even that Madison was in fact the Employer's highest cost facility. Rather, the letters ignored those facts and simply asserted without explanation that the Employer did not compare the wages and benefits at Madison with its other facilities or use information about those other facilities as a basis for its position. Thus, the Employer made no attempt to reconcile the Employer's new assertion with its initial claim, or to provide specific reasons why its new assertion reflected its true bargaining position.³⁰ Under these circumstances, the Employer's "bare assertion" that it did not rely on PACCAR plants' comparative labor costs "'amounted to nothing more than a clumsy effort to shed a statutory responsibility'" to supply the relevant information.³¹

Finally, we are aware that on June 11, when the Employer presented its economic package, it responded to the Union's objections by stating that the package was fair for the area and that the Union should tell its members to search for another Madison area workplace that paid what the Employer was proposing. However, the Employer never suggested by that statement that it was basing its bargaining position on the wages of other Madison area businesses; rather, it was merely responding to the Union's protest by arguing that its package was competitive and that employees would not necessarily fare better working for another employer. Thus, the comment did not undercut the Employer's later, unequivocal claim that it was basing its concessionary proposals on a comparison between Madison and all the Employer facilities.

Accordingly, the Employer never credibly disavowed its claim that it was basing its proposal on comparative labor costs, and that information remained relevant to the Union's ability to bargain intelligently and effectively with the Employer.

³⁰ Cf. Advertisers Mfg. Co., 275 NLRB at 100-101 (employer unequivocally disavowed initial claim with specific written reasons).

³¹ C-B Buick, Inc., 206 NLRB 6, 8 (1973), quoted in UFCW Local 1C v. NLRB, 467 F.3d at 754-755.

**The Employer's Unlawful Refusal To Provide
Information Converted the Lockout to an Unlawful
Lockout**

An employer does not violate the Act by locking out its bargaining unit employees for "legitimate and substantial business reasons, including" in support of legitimate bargaining demands.³² A union's power to end the lockout, however, rests entirely on its ability to reach an agreement that is acceptable to an employer. An employer thus engages in an unlawful lockout if the lockout is designed to evade its bargaining obligation.³³ An employer may not lock out its employees while refusing to bargain with the union,³⁴ or where it is engaging in bargaining tactics that hamper negotiations to the extent that the parties are prevented from reaching an agreement that would have occurred earlier and ended the lockout.³⁵ In this regard, an employer may not lock out its employees where it is unlawfully refusing to provide information to the union that is important to the bargaining process, thus hindering the parties' ability to reach agreement.³⁶

³² Eads Transfer, Inc., 304 NLRB 711, 712 (1991), enf'd, 989 F.2d 373 (9th Cir. 1993). See American Ship Building, 380 U.S. 300, 318 (1965); Brown Food Stores, 380 U.S. 278, 288 (1965); Bunting Bearings Corp., 349 NLRB 1070 (2007).

³³ American Ship Building Co., 380 U.S. at 308, 311; Royal Motor Sales, 329 NLRB 760, 777 (1999), enf'd, 2 Fed. Appx. 1 (D.C. Cir. 2001); Clemson Bros., 290 NLRB at 945.

³⁴ See American Stores Packing Co., 158 NLRB 620 (1966) (employer violated Section 8(a)(5) by its intransigence in refusing to discuss union's proposals and violated Section 8(a)(3) when it locked out employees to force agreement on its unlawful terms).

³⁵ See Bagel Bakers Council, 174 NLRB 622 (1979), enf'd in relevant part, 434 F.2d 884 (2d Cir. 1970).

³⁶ See Globe Business Furniture, 290 NLRB 841, 841 n.2, 854 (1988) (lockout unlawful because employer unlawfully refused to give union information about all employees' compensation and insurance costs, which were crucial to bargaining over the employer's proposals on hiring temporary employees and health insurance), enf'd mem. 889 F.2d 1087 (6th Cir. 1989); Clemson Bros., 290 NLRB at 945 (lockout unlawful in part because employer refused to provide relevant requested information to the union about the employer's losses to justify cost reductions; information would have allowed the union to bargain

A lawful lockout will convert to an unlawful one if the employer engages in conduct that is "inconsistent" with a lawful lockout, "materially motivated" by unlawful conduct, or maintained to further the employer's unlawful as well as its lawful conduct.³⁷

Here, the Employer locked out the employees on June 23. Since the Employer did not unlawfully refuse to provide the relevant information to the Union until July 16, the lockout was lawful at its inception because the Employer was using it as a legitimate tool to pressure the Union to agree to the Employer's bargaining proposals.³⁸

We agree with the Region that on July 16, when the Employer unlawfully refused to supply the requested labor cost information, the lawful lockout converted to an unlawful one. As discussed above, the information was crucial to the Union's ability to bargain effectively concerning the central issues preventing the parties from reaching an agreement—broad outsourcing clauses and reduced compensation for recalled employees through a multitiered compensation system.³⁹ Further, the Union made clear

intelligently without unnecessary labor strife); Bagel Bakers Council, 174 NLRB at 630-632 (lockout unlawful).

³⁷ See R.E. Dietz Co., 311 NLRB 1259 1267 (1993) (employer unlawfully bargained to impasse over permissive subjects; conduct converted lawful lockout to unlawful lockout). See also Blu-Fountain Manor, 270 NLRB 199, 205-206 (1984), enf'd, 785 F.2d 195 (7th Cir. 1986) (employer's refusal to supply relevant information is an unfair labor practice that converts an economic strike to an unfair labor practice strike). Cf. Redway Carriers, 301 NLRB 1113, 1114, 1115 (1991) (finding employer's lawful lockout did not convert to an unlawful one; employer's later unlawful bargaining position did not "materially motivate" decision to continue lockout).

³⁸ See American Shipbuilding, 380 U.S. at 308.

³⁹ See Globe Business Furniture, 290 NLRB at 841 n.2, 854; Clemson Bros., 290 NLRB at 945. Cf. Central Illinois Public Serv. Co., 326 NLRB 928, 936 (1998), enf'd, 215 F.3d 11 (D.C. Cir. 2000) (employer's unlawful refusal to supply requested information to the union did not lead to an unlawful lockout because the missing information did not relate to bargaining matters); Delhi Taylor Refining Div., 167 NLRB 115, 117 (1967), enf'd, 415 F.2d 440 (5th Cir. 1969) (employer's insistence on a change in the scope of the unit did not render the employer's lockout unlawful because the insistence did not affect the parties')

throughout the negotiating process, both in its communications with the Employer and the bargaining unit, that it could not effectively represent its members without that information. The Employer's refusal to provide the information undermined bargaining as it precluded the Union from evaluating intelligently the Employer's proposals and from making effective counterproposals. Hence, the Employer's conduct converted the lawful lockout to an unlawful lockout.⁴⁰

CONCLUSION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5), (3), and (1); it failed to provide the Union with the relevant labor cost information on other PACCAR facilities, and it unlawfully locked out the employees after its July 16 failure to provide the labor cost information.

/s/
B.J.K.

collective-bargaining negotiations; the employer would have locked out employees even if the unit question was not present and the unit issue did not frustrate bargaining on the other issues separating the parties).

⁴⁰ [FOIA Exemption 5